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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1982

INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, AFL-CIO,
Petitioner,

VS.

WILLIAM A. LUBBERS, GENERAL COUNSEL OF THE NATIONAL LABOR RELATIONS BOARD, JAMES S. SCOTT, REGIONAL DIRECTOR, REGION 32 OF THE NATIONAL LABOR RELATIONS BOARD, JOHN H. FANNING, CHAIRMAN, AND MEMBERS HOWARD JENKINS, JOHN A. PENNELLO AND JOHN C. TRUESDALE, INDIVIDUALLY AND AS CHAIRMAN AND MEMBERS OF THE NLRB, NORTON J. COME, DEAN H. FRANCIS AND BETTY J. MURPHY, INDIVIDUALLY,
Respondents,
and
LOCKHEED MISSILES & SPACE CO., INC.,
Intervenor.

Petition For Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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QUESTIONS PRESENTED

1. Whether the Federal District Court possessed jurisdiction to review the General Counsel's alleged abuse of his statutory discretion under the facts alleged in the complaint.

2. Whether the General Counsel's decision to withdraw and dismiss the International's ULP complaint is presumptively reviewable.

3. Whether the General Counsel's withdrawal and dismissal of the International's ULP complaint without hearing exceeded the statutory purview of his discretion.

4. Whether the "policy considerations" of reviewability militate in favor of judicial review of the General Counsel's decision pursuant to the provisions of the Administrative Procedure Act.

5. Whether dismissal of the International's Complaint pursuant to FRCP 12(b)(1) contravenes the policies and statutory intendments of notice pleading under FRCP 8 and constitutes a denial of due process.

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LOCKHEED MISSILES & SPACE CO., INC.,
Intervenor.

Petition For Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

Petitioner International Association of Machinists and Aerospace Workers, AFL-CIO (International), respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on July 13, 1982. A continuance to file this Petition for Writ of Certiorari was granted by Justice Rehnquist on October 1, 1982, extending the time for filing to October 29, 1982.

OPINIONS BELOW

The opinion of the Court of Appeals entered on July 13, 1982 (582 F.2d 598) is attached hereto as Appendix A. The Court of Appeals decision affirmed the prior Order of the District Court for the Northern District of California, dated June 13, 1980, dismissing Petitioner's Complaint for lack of subject matter jurisdiction, a copy of which decision is attached hereto as Appendix B.

JURISDICTION

This Court's jurisdiction is invoked under Title 28 United States Code, Section 1254(1).

STATUTORY PROVISIONS INVOLVED

The statutory provisions that are primarily involved with this disposition of this matter are set forth in Appendix C.

STATEMENT OF THE CASE

This case is before the Court on the decision of the Ninth Circuit Court of Appeals entered on July 15, 1982, sustaining the Order of the United States District Court for the Northern District of California which dismissed an action previously filed by the International on December 18, 1979, for lack of subject matter jurisdiction. Appendices A, B.

Petitioner's Complaint sought declaratory and injunctive relief against the General Counsel of the National Labor Relations Board (NLRB), *et al.*, for the purpose of securing a judicial review of the General Counsel's final order

of October 19, 1979, to withdraw and dismiss that unfair labor practices complaint (ULP) issued in the matter of the "International Association of Machinists and Aerospace Workers, AFL-CIO and Lockheed Missiles and Space Company," 32-CA-371 (filed 12/5/77).[1] The Complaint asserted jurisdiction under the Labor Management Relations Act, 1947, as amended, (LMRA), 29 USC §§ 151, *et seq.;* the Administrative Procedure Act, (APA), 5 USC §§ 701, *et seq.;* the provisions of 28 USC §§ 1337, 1361, 1391 and 2201, and, the Fifth Amendment of the United States Constitution (CR-1:1).

The gravamen of Petitioner's Complaint was that Respondent General Counsel abused his discretion in ordering the withdrawal and dismissal of the referenced ULP complaint, which action was in contravention of and "departed without explanation or reason from NLRB's prior precedent and decisional law in *United Steelworkers Union and Lynchburg Foundry Co.*, 192 NLRB 773 (1971)." Par. 21, *Complaint* (12/18/79) (CR-1:6-7).

The original ULP charge filed by Petitioner in NLRB Case No. 32-CA-371 asserted that Intervenor Lockheed Missiles and Space Co. (LMSC), had violated LMRA Sections 8(a)(1)(5) by withdrawing from multi-unit corporate-wide bargaining between the Lockheed Aircraft Corporation (LAC), on behalf of its subsidiary companies, including LMSC, and the International, on behalf of its affiliated lodges, including District Lodge 508, and subsequently unilaterally securing an agreement with District Lodge 508. Pars. 10-14, Complaint (12/18/79) (CR-1:4-5). After investigation, the Regional Director issued a complaint and

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[1]A discussion of the conflicting claims between the parties is contained in the opinion of the Court of Appeals in the case of *Benda, et al. v. Grand Lodge of the International Association of Machinists & Aerospace Workers*, reported at 584 F.2d 308 (1978) affirming the opinion of the District Court for the Northern District of California entered on December 15, 1977, and reported at 442 F. Supp. 431 (N.D. Cal. 1978).

notice of hearing on February 8, 1978, with further processing of the complaint thereafter deferred by direction of the NLRB General Counsel on April 7, 1978 (CR-1:5).

Notwithstanding the fact that LMSC's actions were deemed sufficient to bottom the issuance of a ULP complaint by Region 32, on August 17, 1979, at the direction of the NLRB General Counsel, the Regional Director issued an order withdrawing its ULP complaint and dismissing the charges, without hearing, on the basis that LMSC had not unlawfully refused to bargain because of its good faith belief that the International had engaged in bad faith bargaining in violation of Section 8(b)(3) by insisting upon a pooled ratification of all LAC contract proposals. An appeal to the Office of the General Counsel was denied, (CR-1:6).

The Complaint in the instant case was filed by the International on December 18, 1979 and alleged that the General Counsel and his agents and representatives, in withdrawing the unfair labor practice complaint without adjudication, had departed without explanation or reason from prior Board precedents and decisional law, approving a union's insistence upon pooled ratification procedures. See: *United Steelworkers and Lynchburg Foundry Co.*, 192 NLRB 773 (1971).The International's Complaint also asserted that the NLRB action was arbitrary, capricious, and not in accordance with law; that the action of the General Counsel was in excess of his statutory authority and denied the International due process of law; and, that the International would suffer irreparable damage and had no adequate remedy at law other than the United States District Court action through which it sought review of the action of the NLRB General Counsel and his agents and representatives (CR-1:6-8).

THE CIRCUIT COURT'S DECISION

In affirming the District Court's dismissal of the International's Complaint for lack of subject matter jurisdiction, the Circuit Court found that the International's "assault on the nonreviewability of the General Counsel's prosecutorial

decisions is foreclosed by a clear line of contrary authority" (no citations). Pg. A-3, *Circuit Opinion*, Appendix. The Circuit Court further found, without discussion, that "when no settlement of a complaint is at issue, the decision to withdraw the charge is non-reviewable," citing the Fourth Circuit's decision in *George Banta Co. v. NLRB*, 626 F.2d 354 (4th Cir. 1980). Pg. A-11, *Opinion*, Appendix.

Addressing this Court's decision in *Leedom v. Kyne*, 358 U.S. 184 (1958), the Circuit Court found that *Leedom* vested the federal courts with a narrow jurisdiction "to strike down an order of the Board made in excess of its delegated powers and contrary to a specific prohibition in the Act," to which the Fifth and Ninth Circuits have engrafted additional jurisdictional exceptions where the "Board's actions . . . violate constitutional rights" [*Bova v. Pipefitters & Plumbers Local 60*, 554 F.2d 226, 228-229 (5th Cir. 1977)], or where the agency's actions are "wholly without basis in law" [*NLRB v. IBEW, Local 357*, 445 F.2d 1015, 1016 n. 2 (9th Cir. Cal. 1971)]. Pg. A-8-9, *Opinion*, Appendix.

Upon its view of the facts, the Circuit Court found that the International's Complaint failed to qualify under any of the three categories. The Court found no violation of the LMRA or violation of the International's constitutional rights. And, lastly, the fact that the General Counsel chose not to abide by the case precedent of *United Steelworkers and Lynchburg Foundry*, 192 NLRB 773 (1971) did not deny his decision a basis at law since the International "never presented the NLRB with any legitimate objectives to be achieved by pooled ratification." Pg. A-10, *Opinion*, Appendix.

REASONS FOR GRANTING THE WRIT

The Court of Appeal's opinion reflects a division and conflict between the circuits concerning judicial review of the decisions of the General Counsel pursuant to the Administrative Procedure Act (APA), 5 U.S.C. §§ 500, *et seq.*, while at the same time abrogating the decisional authority of *Leedom v. Kyne*, 79 S.Ct. 180, 359 U.S. 184, 3

L.Ed.2d 210 (1958), vesting the federal courts with subject matter jurisdiction to review allegations of abuse of discretion by the General Counsel in the exercise of his powers under the LMRA. And, further, by sustaining the dismissal of the within Complaint for lack of subject matter jurisdiction pursuant to the provisions of FRCP 12(b)(1), the Court of Appeal's opinion abrogated the decisional authority of *Jenkins v. McKeithen*, 89 S.Ct. 1843, 395 U.S. 411, 23 L.Ed. 404 (1969), *et al.*, proscribing dismissal of a complaint unless it appears that plaintiff could prove no set of facts in support of his claim which would entitle him to relief. See: S.Ct. Rule 17.1(a), (c). For these reasons, therefore, the grant of a writ of certiorari should issue herein based upon the following argument:

ARGUMENT

I

THE FEDERAL DISTRICT COURT POSSESSED JURISDICTION TO REVIEW THE GENERAL COUNSEL'S ALLEGED ABUSE OF HIS STATUTORY DISCRETION

Regardless of the validity of the frequently assumed legal principle that the General Counsel's decision not to issue an unfair labor practices complaint is totally discretionary and not generally subject to judicial review, there was jurisdiction to consider the merits of Petitioner's Complaint under the circumstances of the instant case.

Even a cursory review of the Complaint reveals that the suit was fundamentally based upon allegations that the General Counsel withdrew the ULP complaint and dismissed the charges on a stated basis which was contrary to established Board legal precedent thereby constituting an abuse of discretion.[2]

---

[2]The General Counsel dismissed the International's ULP complaint below on the asserted ground that the International's reliance on pooled ratification voting was unlawful notwithstanding Board precedent in *Lynchburg* which held: "The pooled ratification procedure utilized by respondents was lawful under the Act. . . ."

There can be no serious question that a District Court has jurisdiction to review discretionary action of an administrative agency which is erroneous as a matter of law and, thus, an abuse of its administrative discretion. *Leedom v. Kyne,* 358 U.S. 184, 79 S.Ct. 180, 3 L.Ed.2d 210 (1958); *Harmon v. Brucker,* 355 U.S. 579, 78 S.Ct. 433, 2 L.Ed.2d 503 (1958); See *Panama Canal Co. v. Grace Lines, Inc.,* 356 U.S. 309, 78 S.Ct. 752, 2 L.Ed.2d 788 (1957); *McCulloch v. Sociedad Nacional, etc.,* 372 U.S. 10, 83 S.Ct. 671, 9 L.Ed.2d 547 (1963); *Pacific Southwest Airlines v. NLRB, supra,* at page 1312; *Bova v. Pipefitters & Plumbers Local 60,* 554 F.2d 226, 228-229 (footnotes 12 and 13) (5th Cir. La. 1977); *Bays v. Miller,* 524 F.2d 631, 632-633 (9th Cir. Cal. 1975); *Balanyi v. IBEW,* 374 F.2d 723, 726 (7th Cir. Ill. 1967); *So. Cal. Dist. Coun. Lab. Loc. 1184 v. Ordman,* 318 F.Supp. 633, 636 (C.D. Cal. 1977).

It is curious that the Circuit Court cited the PSA case for the proposition that a decision not to issue an unfair labor practice complaint is normally not subject to judicial review (CR-29:1). The *PSA* case more properly holds that the Board decision was not a proper subject for direct review *by the Circuit Court* under the provisions of section 10(f) of the Act. The majority opinion specifically notes that review of the Board's action, if any, would properly lie in the District Court. The dissenting judge in the *PSA* case was of the opinion that the Circuit Court had authority to review the administrative action. Contrary to the opinion of the District Court below, that there was no jurisdiction for judicial review under the circumstances of the case, all three judges in the *PSA* case felt that some judicial review might be appropriate but disagreed upon the proper forum. *Pacific Southwest Airlines v. NLRB,* supra at 1311-1313.

The gravamen of Petitioner's Complaint was that the General Counsel abused his discretion and deprived Petitioner of due process of law in ordering the withdrawal and dismissal of the unfair labor practices complaint in contravention and departure from established prior precedent

and decisional law governing the legality of pooled ratification procedures as enunciated in *United Steel Workers Union and Lynchburg Foundry Co.*, 192 NLRB 773 (1971). (CR-1:6-7). The issue presented to the District Court was therefore, "a purely legal question" as observed by the District Court in *So. Cal. Dist. Council of Lab. v. Ordman*, 318 F.Supp. 633, 636 (D.C. Cal. 1970). There the General Counsel dismissed plaintiff's unfair labor practice under the six month statute of limitations of NLRA § 10(b). In disputing the General Counsel's interpretation of that section, the District Court found itself empowered to reinstate plaintiff's unfair labor practice stating:

> "Under the undisputed facts of this case, however, defendant, because of its incorrect application of § 10(b), refused even to consider plaintiffs' charges. The interpretation of the statute of limitations is a purely legal question, distinguishable from questions of administrative policy requiring the special expertise of the General Counsel. Moreover, judicial resolution of this question is essential to prevent the erroneous construction of § 10(b) from barring henceforth, the General Counsel's investigation of otherwise valid charges.
>
> "The peculiar facts presented herein make this, thus, an extreme case which compels limited judicial action. Under these circumstances, there is ample authority to support a finding of jurisdiction in this Court. See *McCulloch v. Sociedad Nacional, etc.*, 372 U.S. 10, 83 S.Ct. 671, 9 L.Ed.2d 547 (1963); *Leedom v. Kyne*, 358 U.S. 184, 79 S.Ct. 180, 3 L.Ed.2d 210 (1958); *Hotel Employees Local No. 255 v. Leedom*, 358 U.S. 99, 79 S.Ct. 150, 3 L.Ed.2d 143 (1958); *Office Employees International Union Local No. 11, AFL-CIO v. N.L.R.B.*, 353 U.S. 313, 77 S.Ct. 799, 1 L.Ed.2d 846 (1957)."

Similarly, the General Counsel herein, by failing to apply *Lynchburg* to the disposition of plaintiff's unfair labor practice committed an error of law which was subject to remedy by the District Court.

II

THE GENERAL COUNSEL'S DECISION TO WITHDRAW AND DISMISS THE INTERNATIONAL'S ULP COMPLAINT IS PRESUMPTIVELY REVIEWABLE

As a general proposition, a complainant in an administrative procedure has standing to challenge agency action abridging his interests where those interests are within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question. *Data Processing Service v. Camp,* 397 U.S. 150, 90 S.Ct. 827, 25 L.Ed.2d 184 (1970); 5 U.S.C. § 701. In granting review of a regulation promulgated by the comptroller of the currency, this Court noted that, where statutes are concerned, the trend is toward an enlargement of the class of people who may protest administrative action and that the whole drive for enlarging the category of aggrieved "persons" is symptomatic of that trend. *Ibid.* at 154.

In *Barlow v. Collins,* 397 U.S. 159, 90 S.Ct. 832, 25 L.Ed. 2d 192 (1970), decided the same day, this Court approved the judicial challenge of a regulation which had been promulgated by the Secretary of Agriculture. Citing the *Data Processing* case, this Court held that the petitioners had standing to sue as persons with a personal stake and interest in the regulation and clearly within the zone of interests protected by the APA. Of particular significance to the instant case is the manner in which the Court dealt with the issue whether judicial review was precluded by Section 701(a) of the APA. The general principles governing standing were outlined by this Court as follows:

> "As we said in *Data Processing Service,* preclusion of judicial review of administrative action adjudicating private rights is not lightly to be inferred. See *Leedom v. Kyne,* 358 U.S. 184, 3 L.Ed.2d 210, 79 S.Ct. 180; *Harmon v. Brucker,* 355 U.S. 579, 2 L.Ed.2d 503, 78 S.Ct. 433; *Stark v. Wickard,* 321 U.S. 288, 88 L.Ed. 733, 64 S.Ct. 559; *American School of Magnetic Healing v. McAnnulty,* 187 U.S. 94, 47 L.Ed. 90, 23 S.Ct. 33. In-

deed, *judicial review of such administrative action is the rule, and nonreviewability an exception which must be demonstrated.* In *Abbott Laboratories v. Gardner,* 387 U.S. 136, 140, 18 L.Ed.2d 681, 686, 87 S.Ct. 1507, we held that:

> 'Judicial review of a final agency action by an aggrieved person will not be cut off unless there is persuasive reason to believe that such was the purpose of Congress.'

"A clear command of the statute will preclude review; and such a command of the statute may be inferred from its purpose. *Switchman's Union v. National Mediation Board,* 320 U.S. 297, 88 L.Ed. 61, 64 S.Ct. 95. It is, however, "only upon a showing of 'clear and convincing evidence' of a contrary legislative intent" that the courts should restrict access to judicial review. *Abbott Laboratories v. Gardner, Supra,* at 141, 18 L.Ed.2d at 687. The right of judicial review is ordinarily inferred where congressional intent to protect the interests of the class of which plaintiff is a member can be found; in such cases, unless members of the protected class may have judicial review, statutory objectives might not be realized. See the *Chicago Junction Case,* 264 U.S. 258, 68 L.Ed. 667, 44 S.Ct. 317; *Hardin v. Kentucky Utilities, Supra.*"

Similarly, in accepting a petition for review of an order of the Occupational Safety and Health Review Commission, the Ninth Circuit has stated in *Marshall v. Union Oil Co. of California,* 616 F.2d 1113, 1117 (9th Cir. Cal 1980):

> "This Court, following the Supreme Court's lead, has consistently held that judicial review of agency action 'will not be cut off unless there is persuasive reason to believe that such was the purpose of Congress.' (Citations). There is no presumption against judicial review and in favor of administrative absolutism. . . . unless that purpose is fairly discernible in the statutory scheme."

Of significance to the instant case by analogy is the decision of this Court in *Dunlop v. Bachowski*, 421 U.S. 560, 95 S.Ct. 1851, 44 L.Ed.2d 377 (1975). In that case, a defeated candidate for union office, after exhausting his remedies within the union, filed a complaint with the Secretary of Labor alleging violations of the Labor-Management Reporting and Disclosure Act. (LMRDA). When the Secretary declined to bring a civil action to set aside the election, the candidate filed suit in the United States District Court seeking a declaration that the actions of the Secretary were arbitrary and capricious and seeking an order directing the Secretary to file suit to set aside the election. The District Court dismissed the action concluding that it lacked jurisdiction. On certiorari, this Court agreed with the Circuit Court of Appeals that the District Court had jurisdiction of the suit pursuant to the provisions of 28 U.S.C. § 1337 as a case arising under an act of Congress regulating commerce and that Sections 702 and 704 of the APA subjected the Secretary's decision to judicial review as "final agency action for which there was no other adequate remedy in a court" and that judicial review was not precluded by Section 701(a) of the APA. *Ibid.* at 566.

In reaching these conclusions, this Court observed that the LMRDA contained no provision which explicitly prohibited judicial review of the decision of the Secretary not to bring a civil action even though 29 U.S.C. § 483 specifically provided that "the remedy provided by this subchapter for challenging an election already conducted shall be exclusive." In the absence of an expressed prohibition by the Act, this Court concluded that the Secretary bears a heavy burden of overcoming the strong presumption that Congress did not intend to prohibit all judicial review of his decision. In support of this statement, the Court quoted the following language from *Abbott Laboratories v. Gardner, Supra,*:

> "The question is phrased in terms of 'prohibition' rather than 'authorization' because a survey of our

cases shows that judicial review of a final agency action by an aggrieved person will not be cut off unless there is persuasive reason to believe that such was the purpose of Congress. (Citations)."

"[*O*]*nly upon a showing of 'clear and convincing evidence' of a contrary legislative intent should the courts restrict access to judicial review.* (Citations)." (Emphasis supplied)

Holding that the Secretary had failed to sustain his burden of demonstrating that Congress meant to prohibit all judicial review of his decision by clear and convincing evidence, the Court concluded that Courts "are necessarily [not] without power or jurisdiction . . . if it should clearly appear that the Secretary acted in an arbitrary and capricious manner by ignoring the mandatory duty he owes plaintiffs under the powers granted by Congress" (Citations).

Of particular relevance to the authority of the General Counsel of the NLRB, this Court's *Dunlop* decision acknowledged that Congress in enacting the LMRDA, settled exclusive enforcement jurisdiction on the Secretary and granted him broad investigative powers in order to best serve the public interest. *Ibid.* at 568 citing *Calhoun v. Harvey*, 379 U.S. 134, 85 S.Ct. 292, 13 L.Ed.2d 190 (1964). Although having made a suit by the Secretary the exclusive post-election remedy, the Court determined Congress had not foreclosed a judicial challenge under the provisions of the APA by an aggrieved party. *Ibid.* at 569-570. The Court concluded in *Dunlop* that, although a reviewing court was not authorized to substitute its judgment for the decision of the Secretary not to bring suit, the Secretary was required to provide the Court and complainant with a statement of reasons supporting his determination sufficiently specific to enable a reviewing court to determine with some measure of confidence whether or not the exercise of the Secretary's discretion was arbitrary or capricious. *Ibid.* at 571.

A. The Legislative History of the LMRA Indicates an Intent to Allow Judicial Review of the General Counsel's Decisions Not to Issue or Withdraw a Complaint Where Such Decisions Violate the Board's "Rules of Decision"

A review of the legislative history of the Labor Management Relations Act (LMRA) reflects that there was substantial discussion during the debate over the adoption of Section 3(d) in 1947 concerning the extent to which the General Counsel's decision would be unreviewable. See: Comments of Magnuson, 93 Cong. Rec. 6614; and, Comments of Murrary, 93 Cong. Rec. 6660-6661.

During the floor debate in 1947 on the adoption of Section 3(d), Senator Taft, one of the leading authors of the amendment, responded to criticism that "it places a tremendous amount of unreviewable power in the hands of a single official." (93 Cong. Rec. 6859, 2 Leg. Hist. of the LMRA 1623 [1947]). Senator Taft specifically stated during this debate that there were situations in which the decision of the General Counsel not to issue a complaint is reviewable:

> "What the conference amendment does is simply to transfer this 'vast and unreviewable power' from this anonymous little group [the Board's legal assistants] to a statutory officer responsible to the President and to the Congress. So far as having unfettered discretion is concerned, *he, of course, must respect the rules of decision of the Board and the Courts.*" (Emphasis supplied)

In addition, the LMRA as originally drafted and as subsquently amended, has always intended that the Board, not the General Counsel, formulate and announce by means of its formal decisions all significant interpretations of the Act. There is no provision in the Act delegating authority to the General Counsel to engage in quasi-administrative decision-making concerning significant interpretations of the Act, and then allowing him to exempt such decisions from judicial review by asserting that a decision not to issue a complaint in a given fact circumstance is within the

General Counsel's "prosecutorial" discretion. Rather, Section 10(f) of the Act expressly guarantees that "any person aggrieved" by final action of the Board or its agents (such as the General Counsel), granting or denying relief sought, may seek judicial review.

In sum, Section 3(d) is nothing more than a statement of the limits of the General Counsel's authority, i.e., General Counsel exercises general supervision over the attorneys, officers and members of the Board and has "final authority, *on behalf of the Board*" in respect to the investigation of charges and issuance of complaints and prosecution of complaints. This is not the type of declaration of nonreviewability which bars judicial review within the meaning of section 701(a) of the A.P.A. Cf. *Califano v. Sanders*, 430 U.S. 99, 97 S.Ct. 980, 51 L.Ed.2d 192 [Review of action of Secretary of Health, Education and Welfare under Social Security Act not subject of review under A.P.A. since judicial review was specifically precluded by statute].

B. The General Counsel's Prosecutorial Discretion Cannot Foreclose Judicial Review of the International's Private Rights

In support of the dismissal of Petitioner's Complaint below, both the attorney for the Board and the District Court relied upon the oft recited proposition that the General Counsel acts with absolute unfettered prosecutorial discretion in the public interest without allowance for the assertion of private rights. (CR-34:8).

The parameters of the General Counsel's "prosecutorial discretion" were addressed by this Court in its decision in the matter of *International Union, Local 283 v. Scofield*, 382 U.S. 205, 86 S.Ct. 373, 15 L.Ed.2d 272 (1965). There this Court held that both the charging and charged party in proceedings before the NLRB may intervene in Section 10(f) enforcement proceedings in the Circuit Court of Appeals. In reaching this decision, the Court carefully considered and balanced the rights and responsibilities of the

parties and of the General Counsel. As the following language from *International Union* reflects, the Supreme Court rejects the proposition relied upon by the District Court that the Board is the custodian of the "public interest" to the exclusion of the so-called "private interest" at stake:

> "In prior decisions, this Court has observed that the Labor Act recognizes the existence of private rights within the statutory scheme. These cases have, to be sure, emphasized the 'public interest' factor. To employ the rhetoric of 'public interest', however, is not to imply that the public right excludes recognition of parochial private interests." *Ibid.* at 218.

Reviewing the statutory scheme and Board's Rules and Regulations, the Court continued as follows:

> "The statutory machinery begins with the filing of an unfair labor practice charge by a private person (citing authority). When the General Counsel issues a complaint and the proceeding reaches the adjudicative stage, the course the hearing will take is in the agency's control, but the charging party is accorded formal recognition. He participates in the hearing as a 'party'. He may call witnesses and cross-examine others, may file exceptions to any order of the trial examiner and a petition for reconsideration to a Board order (citing authorities). Of course, if the Board dismisses the complaint, he can obtain review as a person aggrieved, which serves the 'public interest' by guaranteeing that the Board interpretation of relevant provisions accords with the intent of Congress. And *that the charging party may have vital 'private rights' in the Board proceeding is clear* in this very case, which also involves, potentially, a breach of the parties' collective bargaining agreement." *Ibid.* at 219-220 (Emphasis supplied)

The Court concluded with the following statement:

> "In short, we think that *the statutory pattern of the*

> ***Labor Act does not dichotomize 'public' as opposed to 'private' interests.*** Rather, the two interblend in the intricate statutory scheme." *Ibid.* at 220. (Emphasis supplied).

This Court has retained these limitations upon the General Counsel's discretion as first dilineated in *International Union, supra.* In determining the availability of Board memoranda to requests under the Freedom of Information Act in *National Labor Relations Board v. Sears Roebuck & Co.,* 421 U.S. 132, 95 S.Ct. 1504, 44 L.Ed.2d 29 (1975), this Court again considered the assertion by the General Counsel that his decisions were unreviewable as part of his prosecutorial discretion. This Court dismissed the General Counsel's attempt to analogize his role to that of a public prosecutor, stating:

> "General Counsel's analogy is far from perfect. The General Counsel, unlike most prosecutors, may authorize the filing of the complaint with the Board only if a private citizen files a 'charge.' 29 U.S.C. §§ 153(d) and 160(b) [29 U.S.C. §§ 153(d) and 160(b); 29 CFR § 101.2; *Autoworkers v. Scofield,* 382 U.S. 205, 219, 15 L.Ed.2d 272, 86 S.Ct. 373 (1965); *NLRB v. Indiana Michigan Electric Co.,* 318 U.S. 9, 18, 87 L.Ed. 579, 63 S.Ct. 394 (1964)]. Unlike the victim of a crime, the charging party will, if a complaint is filed by the General Counsel, become a party to the unfair labor practice proceeding before the Board. (Citing authority). And, if an unfair labor practice is found to exist, the ensuing cease-and-desist order will, unlike the punishment of the defendant in a criminal case, coerce conduct by the wrongdoer flowing particularly to the benefit of the charging party. For these reasons, *we have declined to characterize the enforcement of the laws against unfair labor practices either as a wholly public or wholly private matter.* (Citing authorities)."

Carrying the authority and logic of this Court's pronouncements to their logical conclusion, Judge Real, dissenting in *Pacific Southwest Airlines v. NLRB,* 611 Fed.

2d 1309 (9th Cir. Cal. 1980), responded to the General Counsel's historical, but unfounded assertion that he had the discretion of a public prosecutor as follows:

> "A public prosecutor is elected or appointed to vindicate societal interests through the integrity of our criminal laws. Individual interests may benefit peripherally but that is neither the function of nor the result of a public prosecutor in the performance of his duty. General Counsel in contrast, takes the position of an individual or entity in the vindication of a right particularly of personal interest to that individual or entity. The public may incidentally be benefited by peace in our industrial establishment but private rights are the primary concern of the function of General Counsel under the NLRA." *Ibid.* at 1313.

At all events, since Petitioner was plainly possessed of "vital private rights" as a party to the ULP proceeding, the General Counsel was foreclosed from unsurping those rights by dismissal of the ULP complaint in reliance upon a judicially rejected claim of absolute, unreviewable prosecutorial discretion.

III

THE GENERAL COUNSEL'S WITHDRAWAL AND DISMISSAL OF APPELLANT'S ULP COMPLAINT WITHOUT HEARING EXCEEDED THE STATUTORY PURVIEW OF HIS DISCRETION

An essential element of the District Court's decision was its finding that there was no logical or legal distinction between an initial decision by the General Counsel not to file a complaint and a subsequent decision to withdraw a complaint and dismiss charges (Pg. A-14, *District Opinion*, Appendix). To the contrary, a substantial body of law supports Petitioner's contention that once a complaint has issued, the scope of the General Counsel's discretion terminates and the statutory scheme contemplates that the complaint proceed to hearing and be subject to judicial review.

In *Leeds & Northrup Co. v. NLRB*, 357 Fed.2d 527 (3rd Cir. Pa. 1966), the Court considered the reviewability of an informal settlement agreement and withdrawal of a ULP complaint which had been approved by the General Counsel. The charging party sought review in the Court of Appeals pursuant to the provisions of § 10(f) of the Act, and the General Counsel opposed the petition on the ground that there had been no formal order subject to judicial review. Relying upon the APA and the *Scofield* case, *supra*, the Court held that the informal settlement and withdrawal of the complaint was reviewable. In reaching its decision, the Court made the following observations:

> *"Clearly, once a complaint issues the statutory scheme contemplates Board Action. Anything less, such as informal actions of its agents in dismissing such complaint over the objections of the charging party, is arbitrary and capricious.* This is not to say that this Court seeks to project itself into the orderly administration of the affairs of the National Labor Relations Board and its Regional Agents . . . but we do conclude that if an amicable adjustment of a labor dispute cannot be brought about through informal negotiations with the consent of all parties, after the issuance of a complaint, then such informal proceedings must be formalized for Board action within the statutory scheme, thereby creating a record for judicial review."
>
> "Turning now to the central issue, we are called upon to determine whether the Company was entitled to a hearing on its objections to the informal settlement or compromise, entered into between the Regional Director and the charged party, the Union. As pointed out by this Court in *Marine Engineers Ben. Ass'n. No. 13 v. National Labor Rel. Bd.*, 202 Fed.2d 546, 549 (3 Cir. 1953), cert. den. 346 U.S. 819, 74 S.Ct. 32, 98 L.Ed. 345 (1953), this is a question of law. On the authority of that case, as well as upon our conception of the statutory design discussed previously, once a complaint is issued, the charging party is entitled to an evidentiary

hearing upon its objections to the proposed settlement agreement, be it formal or informal. In *Marine Engineers,* at page 549, the following appears:

> 'Our best judgment is that the charging party, after complaint is issued, does have some standing. (citing auth.) *The Board may refuse to do anything about his complaint as already indicated. But once it does, and once it goes to the extent of filing a complaint, then we think that he is entitled to have a chance to be heard as the Administrative Procedure Act requires.* He has a right to object if after hearing he does not like the result. But he certainly has nothing on which to base his objections unless there is a hearing and the record is made so that the court has something to go on.' (citing auth.)

"Both the Labor Management Relations Act, 29 U.S.C.A. §§ 160(c), 160(f) and the Administrative Procedure Act, 5 U.S.C.A. §§ 1005(b), 1006(d), 1007(b), require a record to be made for a reviewing court." *Ibid.* at 533. (Emphasis supplied.)

All circuits, which have considered this issue, have held that, once, an unfair labor practice complaint has been filed, the charging party is entitled at a minimum, to a hearing upon any material issues of disputed fact or a presentation on the record of an explanation for the failure of the Board to proceed to a final adjudication. *Waterway Terminals Company v. NLRB,* 467 F.2d 1011 (9th Cir. Cal. 1972) [Circuit Court review of NLRB order quashing notice of hearing on ULP charges after section 10(K) court review after proceedings begun and factual record made was tantamount to a hearing on the complaint and constituted "final order"] *NLRB v. International Bro. of Elec. Wkrs. Loc. Un., 357,* 445 F.2d 1015 (9th Cir. Cal. 1971); *Oshkosh Truck Corp. v. NLRB,* 530 F.2d 744 (7th Cir. Wis. 1976); *International Ladies Garment Wkrs. Un., etc. v. NLRB,* 501 F.2d 823 (D.C. Cir. 1974); *NLRB v. Oil Chemical & Atomic Workers Int. Un.,* 476 F.2d 1031 (1st Cir.

P.R. 1973); *Concrete Materials of Georgia, Inc. v. NLRB*, 440 F.2d 61 (5th Cir. Ga. 1971).

And, the Circuit Court's citation, herein, to *George Banta Co. v. NLRB*, 626 F.2d 354 (4th Cir. 1980), does not alter this conclusion. Pg. A-11 *Circuit Opinion*, Appendix. In *Banta* the Fourth Circuit found that its decision did "not depend upon whether or not (the General Counsel) has issued a complaint," but upon whether "the decision is fundamentally prosecutorial—based essentially upon a determination that the available evidence will not support prosecution of the alleged violation." *Ibid* at 356. The alleged violation in the instant case was premised on an admitted fact that the employer, Lockheed, chose to circumvent the certified collective bargaining representative, the International Association of Machinists and Aerospace Workers, and deal directly with its constituent lodges. The General Counsel made no *evidentiary* finding that the International's charge could not be sustained. Thus, his decision to withdraw the ULP in this instance did not fall within the purview of his prosecutorial discretion.

IV

THE "POLICY CONSIDERATIONS" OF REVIEWABILITY MILITATE IN FAVOR OF JUDICIAL REVIEW OF THE GENERAL COUNSEL'S DECISION PURSUANT TO THE PROVISIONS OF THE ADMINISTRATIVE PROCEDURE ACT[9]

In its opinion in *Local 2855, AFGE (AFL-CIO) v. United States*, 602 F.2d 574 (3rd Cir. NJ 1979), the Third Circuit addressed itself to the exempting provisions of the APA as it pertains to decisions "committed to agency discretion by law." 5 U.S.C. § 702. While the Circuit herein cited the foregoing APA provision as foreclosing judicial review in

[9]The Ninth Circuit joins with the Seventh Circuit in concluding that the General Counsel's discretion is "committed to agency discretion by law" as regards decisions respecting the issuance of ULP complaints. *Balayni v. IBEW*, 374 F.2d 723 (7th Cir. Ill. 1967). Contrariwise, the District of Columbia Circuit along with the Third

the instant case, the Third Circuit's opinion recommends that the federal courts abide by the "hospitable interpretation" exhortation of this Court in resolving reviewability under the APA, stating at page 578 of its opinion that:

> "The Supreme Court has emphasized repeatedly that the APA's "'generous review provisions' must be given a 'hospitable' interpretation," and that "only upon a showing of 'clear and convincing evidence' of a contrary legislative intent should the courts restrict access to judicial review." Thus, in the absence of a specific statutory preclusion of review, agency action may be determined to be "committed to agency discretion by law" *only when a fair appraisal of the entire legislative scheme, including a weighing of the practical and policy implications of reviewability, persuasively indicates that judicial review should be circumscribed.*
>
> • • • •
>
> "In the same vein, the legislative history of the APA, referred to in *Citizens to Preserve Overton Park v. Volpe,* 401 U.S. 402, 410, 91 S.Ct. 814, 821, 28 L.Ed.2d 136 (1971), indicates that the committed to agency discretion exception to judicial review is intended to be "applicable in those rare instances *where 'statutes are drawn in such broad terms that in a given case there is no law to apply.'* S. Rep. No. 752, 79th Cong. 1st Sess., 26 (1945)." (Emphasis supplied)

Expanding upon the Third Circuit's concept of judicial reviewability, where "practical and policy considerations" militate in favor of such, and denying reviewability where "in a given case there is no law to apply," the District of

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and Fifth Circuits has recognized that judicial review lies under the APA where the Board or General Counsel has departed from past policies and precedent. *Local 777, Democratic Union Organizing Committee, SIU-AFL-CIO v. NLRB* (D.C. Cir. 1979), *supra; Local 2855, AFGE (AFL-CIO) v. United States* (3rd Cir. 1979), *supra; Marriott In-Flite Services Division of Marriott Corp. v. NLRB* (5th Cir. 1969), *supra.* See: S.Ct. Rule 17.1(a) (conflict between the circuits)

Columbia Circuit commented in *Natural Resources Defense Council, Inc. v. S.E.C.*, 606 F.2d 1031, 1043-1044 (D.C. Cir. 1979), that the test is a single inquiry to determine whether a matter is committed to agency discretion:

> "In practice, the determination of whether there is law to apply necessarily turns on pragmatic considerations as to whether an agency determination is the proper subject of judicial review. See *Lagevin v. Chenango Coiurt, Inc.*, 447 F.2d 296 (2nd Cir. 1971); *Medical Committee for Human Rights v. SEC*, 139 U.S. App. D.C. 226, 234, 432 F.2d 659, 667 (1970), vacated and remanded with instructions to dismiss as moot, 404 U.S. 403, 92 S.Ct. 577, 30 L.Ed.2d 560 (1972); Saferstein. *Nonreviewability: A Functional Analysis of 'Committed to Agency Discretion,'* 82 Harv. L.Rev. 367 (168). In making this determination, we first identify as precisely as possible the aspects of the agency's action against which challenge is brought. We then evaluate the relevance of three particularly important factors: the need for judicial supervision to safeguard the interests of the plaintiffs; the impact of review on the effectiveness of the agency in carrying out its congressionally assigned role; and the appropriateness of the issues raised for judicial review. See *Hahn v. Gottlieb*, 430 F.2d 1243 (1st Cir. 1970). Finally, we inquire whether the considerations in favor of nonreviewability thus identified are sufficiently compelling to rebut the strong presumption of judicial review."

At all events, case and statutory experience have clearly demonstrated that the LMRA is hardly "drawn in such broad terms that in a given case there is no law to apply." Indeed, in the instant case it is because there is a "law to apply," to wit, the *Lynchburg* doctrine, that judicial review is mandated. But, Petitioner need not rely on this ground alone, since a review of the "policy considerations" hereafter set forth likewise militate in favor of judicial review under the APA.

A. The Grant of Judicial Review to the General Counsel's Decisions Would Ensure Development of Consistent Standards to Govern His Discretion

Judicial scrutiny of the General Counsel's "discretionary" decisions to issue, deny or withdraw ULP complaints will ensure that the administrative process through which the General Counsel acts is guided by legal concepts and governed by the doctrine of *stare decisis*. The public consumer of the statutory benefits of the LMRA is entitled to rely upon the Act's vast decisional authority as the measure of his rights under the statute. In *Local 777, Democratic Union Organizing Committee, SIU-AFL-CIO v. NLRB*, 603 F.2d 862, 871-872 (D.C. Cir. 1979), the District of Columbia Circuit emphasized the need to require the NLRB to follow, distinguish or overrule its own precedent. Chastizing the Board for failing to abide by its past pronouncements regarding the status of independent contractors vis-a-vis employees in the operation of cabs, the Court remarked:

> "The vacillation of the NLRB in regard to the question of the status of cab leasing makes an attitude of judicial deference to its decision especially inappropriate. The Board cannot, despite its broad discretion, arbitrarily treat similar situations dissimilarly, e.g., *Carnation Company v. NLRB*, 429 F.2d 1130 (9th Cir. 1970); *Burlington Truck Lines v. United States*, 371 U.S. 156, 83 S. Ct. 239, 9 L.Ed.2d 207 (1962); *NLRB v. WGOK, Inc.*, 84 F.2d 500 (5th Cir. 1967); *Burinskas v. NLRB*, 123 U.S. App. D.C. 143, 357 F.2d 822 (1966). When it both fails to distinguish contradictory decisions rendered in similar cases and also misapplies accepted principles of law, it errs doubly, *NLRB v. Metropolitan Life Insurance Co.*, 380 U.S. 438, 443, 85 S. Ct. 1061, 13 L.Ed.2d 951 (1965). *An agency in its deliberations is under an obligation to follow, distinguish, or overrule its own precedent, Brown v. NLRB*, 462 F.2d 699 (9th Cir.), *cert. denied*, 409 U.S. 1008, 93 S. Ct. 441, 34 L.Ed.2d 301 (1972);

May Department Stores Co. v. NLRB, 454 F.2d 148 (9th Cir.), *cert. denied*, 409 U.S. 888, 93 S. Ct. 116, 34 L.Ed.2d 144 (1972); *Carnation Co. v. NLRB, supra.* The NLRB has clearly failed to discharge this obligation here, and its actions indicate that lack of reasoned articulation and responsibility that vitiates the deference we would otherwise show to its very considerable expertise in strictly labor matters. *NLRB v. Madison Courier, Inc.*, 153 U.S. App. D.C. 232, 472 F.2d 1307 (1972), *Office of Professional Employees International Union, Local 425, AFL-CIO v. NLRB*, 136 U.S. App. D.C. 12, 419 F.2d 314 (1969). *Ibid.* at 871-872.

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Although an agency may change its policy as it determines is in the public interest, e.g., NLRB v. Wentworth Institute, 515 F.2d 550 (1st Cir. 1974) when, as here, it announces no principled reason for such a reversal, its action is arbitrary and the courts should be quick to so declare. We have previously held that "an agency changing its course must supply a reasoned analysis indicating that prior policies and standards are being deliberately changed, not casually ignored," *Greater Boston T.V. Corp. v. FCC*, 143 U.S. App. D.C. 383, 394, 444 F.2d 841, 852, *cert. denied*, 403 U.S. 923, 91 S. Ct. 2229, 29 L.Ed.2d 701 (1971); *International Union v. NLRB*, 148 U.S. App. D.C. 305, 317, 459 F.2d 1329, 1341 (1972) ('It is an elementary tenet of administrative law that an agency must either conform to its own precedents or explain its departure from them'); *Public Service Commission v. FPC*, 167 U.S. App. D.C. 100, 115, 511 F.2d 338, 353 (1975); *Garrett v. FCC*, 168 U.S. App. D.C. 266, 270, 513 F.2d 1056, 1060 (1975); see *NLRB v. International Union of Operating Engineers, Local 925 AFL-CIO*, 460 F.2d 589, 604 (5th Cir. 1972); *NLRB v. Silver Bay Local Union*, 498 F.2d 26 (9th Cir. 1974); see *Atchison, T. & S.F. R. Co. v. Wichita Board of Trade*, 412 U.S.

800, 808, 93 S. Ct. 2367, 37 L.Ed.2d 350 (1973). In this case, whether or not it would be proper actually to work an estoppel against the government, see generally, Davis *Administrative Law in the Seventies* 339-404 (1976), the vacillation of the Board's approach compels its demand. We deny enforcement of the Board's order because we are able to determine that the lessees in this case were independent contractors, but even were this not possible on the record before us, we would not grant enforcement without first having received from the Board an intelligible rationale for the distinctions they have drawn between employees and independent contractors." *Ibid.* at 882 (Emphasis supplied.)

An identical approach has been taken by the Fifth Circuit in *Marriott In-Flite Services Division of Marriott Cor. v. NLRB,* 417 F.2d 563, 565 (5th Cir. La. 1969). In *Marriott* the Court took objection to the Board's departure from its policy of providing foreign language balloting in representation elections, stating:

"If the agency establishes a general policy and then departs from it, *judicial approval of the departure will be withheld in the absence of an explanation.* Thus in *Rayonier, Inc. v. NLRB,* 5 Cir. 1967, 380 F.2d 187, we denied enforcement of a Board order and quoted approvingly the following language of Judge Aldrich:

'The Board is free, of course, to make changes in policy, but the seriousness of this one, if that is what it is, would call not only for deep and mature thought, but for the assembly of the most cogent reasons. In the Board's opinion I find neither. [*Northeast Airlines v. C.A.B.,* 1 Cir. 1964, 331 F.2d 579, 589].' 380 F.2d at 190.

Similarly, Judge Brown, concurring in *Mary Carter Paint Co. v. FTC,* 5 Cir. 1964, 333 F.2d 654, rev'd on other grounds, 1965, 382 U.S. 46, 86 S. Ct. 219, 15 L.Ed.2d 128, pointed out that:

> [the] law does not permit an agency to grant to one person the right to do that which it denies to another similarly situated. There may not be a rule for Monday, another for Tuesday, a rule for general application, but denied outright in a specific case.
>
> That description fits exactly the Board's conduct here.
>
> More recently, in *Delta Drilling Co. v. NLRB*, 5 Cir. 1969, 406 F.2d 109, this Court set aside an election in which the Board's agent had stopped off at a union representative's motel room while carrying the ballots away from the polling place. No evidence of ballot-tampering appeared. We noted, however, that the agent's behavior violated 'established Board Policy', 406 F.2d at 112, and that '[s]uch policies are controlling until the Board announces a change and its reasons for the change.' 406 F.2d at 113."

Applying the standards of these Circuit decisions to the case before us, judicial review is compelled. The *Lynchburg* doctrine, sustaining a union's right to insist upon the pooled voting of its constituent locals in a contract ratification election, has never been reversed, distinguished or questioned in any Board decision. It is binding decision of the NLRB and part of the considerable legal precedent governing the Board and the General Counsel in their deliberations, actions and decisions under the statute. At no time did the General Counsel or the Board offer any explanation or excuse for departing from the *Lynchburg* doctrine. Recognizing that the General Counsel is possessed with the right and discretion to amend or abandon *Lynchburg*, such a departure in policy can only be judicially sanctioned where there is a "principled reason for such a reversal" (*Local 777, Democratic Union Organizing committee, SIU-AFL-CIO v. NLRB, supra* at 882) based upon "the most cogent reasons" (*Marriott In-Flite Services Division of Marriott Corp. v. NLRB, supra*, at 565); otherwise, "judicial approval of the departure will be withheld." *Ibid.* By the foregoing principle, therefore, the General

Counsel's decision herein should be subjected to judicial scrutiny since the record is devoid of a "principled reason" for his abandonment of the *Lynchburg* doctrine.

B. The Grant of Judicial Review to the General Counsel's Decisions Would Prevent Unwarranted Intrusions into the Internal Affairs or Labor Unions and Frustration of the Principles of Collective Bargaining Underlying the NLRA

It was the stated intent of the General Counsel and the Ninth Circuit to deny to the International the "pooled ratification" procedures approved in *Lynchburg*. As previously noted, the General Counsel declined to articulate his abandonment or withholding of *Lynchburg* from the facts of this case. The Circuit Court was, however, undaunted by this fact and proceeded to find that since the International had failed to exercise its option to require pooled ratification voting of its constituent lodges in past negotiations with Lockheed, the International had effectively waived its rights under *Lynchburg*. Pg. A-5, *Circuit Opinion*. Appendix. The Circuit Court also found that the International "never presented the NLRB with any legitimate objectives to be achieved by pooled ratification." Pg. A-10, *Circuit Opinion*, Appendix.

What the General Counsel and the Ninth Circuit failed to recognize, however, was the fact that the pooled ratification procedures were an integral part of the International's Constitution and governing rules and policies.[4] It was nothing less than presumptuous for the General Coun-

[4]Circular No. 596 constituted a formal policy statement of the International President respecting multi-unit bargaining agreements providing that:

> "Prior to any vote to accept or reject a proposed agrement by an IAM bargaining unit affected by multi-unit agreements with the same employer, company or corporation, *the International President* or his designated representative or *an authorized committee* shall determine whether all the units shall be combined for voting purposes or shall be permitted to vote separately or in what combination. . . ." (CT 370) (Emphasis supplied).

sel and the Circuit Court to say when or how the International would exercise its internal rules. This Court in its decision in *Boilermakers v. Hardeman*, 91 S. Ct. 609, 401 U.S. 233, 246, 28 L.Ed.2d 10 (1971), enunciated a principle of exercising sound reluctance to interfere with internal union affairs, which principle has been followed by the Circuit Courts. See: *Busch v. Givens*, 627 F.2d 978, 981 (9th Cir. Cal. 1980); *Kahn v. Hotel & Restaurant Employees and Bartenders International*, 597 F.2d 1317 (9th Cir. Cal. 1979); *Stelling v. Brotherhood of Electrical Workers*, 587 F.2d 1378, 1389 (9th Cir. Cal. 1978); *Blanchard v. Johnson*, 532 F.2d 1074, 1078 (6th Cir. Ohio 1976); *Gurton v. Arons*, 339 F.2d 371, 375 (2nd Cir. N.Y. 1964).

The fact that the International had not previously insisted upon pooled ratification in its bargaining relationship with Lockheed does not justify the effective judicial negation of Circular No. 596. For as observed by the NLRB in *Lynchburg*, the mere fact that a union has not previously exercised its option to insist upon a pooled ratification vote does not constitute a waiver of its right in this regard. *United Steelworkers and Lynchburg Foundry, supra*, at 788. If the Ninth Circuit is allowed to not only usurp the judgment of the International as to when to call for a pooled ratification vote, but also to reject the NLRB's decision that no waiver occurs through a union's nonexercise of that right, then we are surely "apt to produce incompatible or conflicting adjudications" at odds with the NLRB to whom Congress confided "the primary power of interpretation and application of the Act." *Boilermakers v. Hardeman, supra* at 240; *NLRB v. Nash-Finch Co.*, 92 S. Ct. 373, 404 U.S. 138, 144-147, 30 L.Ed.2d 328 (1971); *Garner v. Teamsters Union*, 74 S. Ct. 161, 346 U.S. 485, 490-491, 98 L.Ed.2d 228 (1953).

Similarly, by denying the International recourse to pooled ratification voting in its dealings with Lockheed, the General Counsel tipped the scale decidedly in the employers' favor, upsetting the statutory balance between

labor and management. *NLRB v. Knuth Bros.*, 537 F.2d 950, 956-957 (7th Cir. Wisc. 1976); *American Ship Bldg. Co. v. NLRB*, 85 S. Ct. 955, 380 U.S. 300 316-317, 13 L.Ed. 2d 855 (1965). The keystone to bargaining strength is the right of a labor organization to engage in concerted actions. In fact, the Act provides that "employees shall have the right to self-organization, . . . to bargain through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection . . ." 29 U.S.C. § 157. Accordingly, the International was well within its rights, as the employees certified representative, to impose a pooled ratification voting procedure for the "mutual aid" and "protection" of its Lockheed bargaining units. Thus, the General Counsel's actions withdrawing the International's ULP, emasculating the International's Board given right to pooled ratification procedures, contravened the statutory rights of this petitioner to engage in concerted activities.

Lastly, to suggest that the International had an affirmative duty to justify the use of pooled ratification procedure to the NLRB is folly as it was given no opportunity or forum to offer an explanation. But, more importantly, it was under no legal obligation to do so. The Circuit Court's findings in this regard are without legal support.

V

DISMISSAL OF PETITIONER'S COMPLAINT PURSUANT TO FRCP 12(b)(1) CONTRAVENES THE POLICIES AND STATUTORY INTENDMENTS OF NOTICE PLEADING UNDER FRCP 8 AND CONSTITUTES A DENIAL OF DUE PROCESS

FRCP 8(a) provides as follows:

> "(a) Claims for Relief. A pleading which sets forth a claim for relief, whether an original claim, counterclaim, cross-claim, or third-party claim, shall contain (1) a short and plain statement of the grounds upon which the court's jurisdiction depends, unless the court

already has jurisdiction and the claim needs no new grounds of jurisdiction to support it, (2) a short and plain statement of the claim showing that the pleader is entitled to relief, and (3) a demand for judgment for the relief to which he deems himself entitled. Relief in the alternative or of several different types may be demanded."

FRCP 8(f) provides as follows:

"(f) Construction of Pleadings. All pleadings shall be so construed as to do substantial justice."

The District Court below acted pursuant to FRCP 12(b)(1) finding on the face of Petitioner's Complaint that it did not have subject matter jurisdiction to review the General Counsel's decision to withdraw an ULP complaint. Pg. A-14, *District Opinion*, Appendix. The vice of the District Court's action, if upheld, is to deprive a plaintiff from ever successfully litigating a complaint for abuse of discretion on the part of the General Counsel. By command of FRCP 8(a), plaintiffs are limited to the pleading of ultimate facts setting forth the basis of federal jurisdiction. The plaintiff is not required by FRCP 8(a) "to set out in detail the facts upon which he bases his claim."[9] *Conley v. Gibson*, 78 S. Ct. 99, 355 U.S. 41, 47-48, 2 L.Ed.2d 80 (1957). Yet, the clear message of the District Court's decision, and its affirmance by the Ninth Circuit, is that a mere allegation of abuse of discretion will justify dismissal for lack of subject matter jurisdiction.

The fact that the Ninth Circuit's decision looked to the underlying facts set forth in *Benda v. Grand Lodge Etc, supra*, in measuring the jurisdictional competency of the Complaint is an admission of the legal deficiencies of the District Court's summary dismissal. Pg. A-3, *Circuit Opin-*

[9]It is interesting to note that the Ninth Circuit has, from the outset, challenged this Court's interpretation of notice pleading under FRCP 8 proposing that FRCP 8(a) be amended "to contain the facts constituting a cause of action." 2a *Moore's Federal Practice*, ¶8.01 [4] (1982).

ion, Appendix. While attempting to affirm the District Court's dismissal of this complaint based upon a reference to the prior *Benda* action, the Circuit Court incorrectly presumes that Petitioner cannot develop new and additional facts not produced in *Benda*. It also impliedly admits that dismissal cannot be justified without reference to a factual record. The *Benda* decision was never a trial on the merits of factual allegations, but rendered upon a motion for preliminary injunction interposed by plaintiff Benda against the International. In short, Petitioner has never been afforded the opportunity to advantage itself of discovery procedures and develop a factual basis for its claims. This is the effect of the District Court's dismissal under FRCP 12(b)(1). It was a judicial finding that there can be no conceivable basis for jurisdiction.

But, such is not the rule under FRCP 8. As reflected by FRCP 8(f), "pleadings shall be so construed as to do substantial justice." That is to say, a complaint should not be dismissed unless it appears that plaintiff could prove no set of facts in support of his claim which would entitle him to relief. *Jenkins v. McKeithen*, 89 S. Ct. 1843, 395 U.S. 411, 422, 23 L.Ed. 404 (1969); *Glus v. Brooklyn Eastern Dist. Terminal*, 79 S. Ct. 760, 359 U.S. 231, 235, 3 L.Ed.2d 770 (1959); *Maty v. Grasselli Chemical Co.*, 58 S. Ct. 507, 303 U.S. 197, 200, 82 L.Ed. 745 (1938). And, to ignore this interpretation of FRCP 8, as the District and Circuit Courts have herein, so as to effectively deny Petitioner access to the federal courts for litigation of its claims, is to deny Petitioner its rights to due process of law. *Windsor v. McVeigh*, 93 U.S. 274, 277-278, 283-284, 23 L.Ed. 914 (1876).

CONCLUSION

For all of the foregoing reasons, this Court should grant certiorari.

Dated: October 25, 1982

Respectfully submitted,

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